

Current HCDA Procedure for Considering Development Permit Application

Clarifying the Nature of Hearings on Development Permit Application

1. **Pre-Application.** Provide technical consultation to applicant indicating desire to file application. This technical consultation includes: making them aware of application requirements; time table for processing the application; requirement to present their project before the Neighborhood Board; requirement to submit their draft project design to the HCDA Design Review Board; review of the project by relevant state and county agencies for the purpose of securing approvals or comments from those agencies relevant to the project; and the procedure for their presentation of the project at the two hearings provided by law.

No update, other than acquainting the applicant with the potential need for counsel to present their case.

2. **Preliminary Comment Period.** Applicant finalizes their application, presenting all required information in the format prescribed by rules. The HCDA sends out notice of the project and information to State/County agencies soliciting their comments by a time certain (e.g., 30 days). HCDA also schedules a meeting for agencies to appear and ask questions of the developer.

Applicant conducts their briefings before the Ala Moana Kakaako Neighborhood Board and the Design Review Board seeking comment on the project prior to Authority of the project.

No update.

3. **Application Deemed Complete.** Upon receipt of state/county agency comments, confirmation of project presentation before the Ala Moana/Kakaako Neighborhood Board, Design Review Board, and completion of all application forms, the Executive Director deems the application complete and causes the notice of the hearings [in accordance with Chapter 91 HRS (which governs contested case hearings)]. Senate President/Speaker of the House and other officials receive notice of the project and hearing dates. This same notice is distributed to area State legislators and City Council members, all AOA (Association of Apartment Owners) and other stakeholders. Staff sends out notice to 2,000 pax email list, publish information on the HCDA website amongst other means.

No update.

4. **Publication of Notice.** Hearing notice is published in newspaper of major circulation in the County where the project is located indicating date, time and place of hearings on development permit application. The notice also indicates what modifications or variance is being requested and solicits testimony via the Authority's website.

No update, except that the notice now includes a 14 day period/ deadline after the notice appears in the papers for interested parties to file a motion to intervene in the proceedings.

5. **First Hearing is held.** Staff provides their report, summarizing the application and the information received to date regarding the project. Applicant presents their project to the Authority and submits to questioning by the Authority. Public testimony is accepted.

No update, except that the Applicant must now present their case with the aid of sworn witnesses and exhibits. The parties are allowed (as is the Authority) to cross-examine the witnesses. This is a function of the due process that is accorded to the parties and is a feature of contested case hearings.

People testifying as public witnesses to the hearing are not sworn in or cross-examined by anyone other than the Authority (as is the current practice). It is for the Authority alone to weigh the credibility of the unsworn testimony that is provided by the public.

It is important to note that contested case hearings do not routinely allow public testimony to be included in the record. However, HCDA's enabling statute (Chapter 206E-5.6 HRS) specifically requires that the HCDA conduct the two hearings, solicit public testimony and provide reports to the State Legislature regarding the public comments/ testimony that is received for the project.

6. **Weekday Night/Weekend Day Opportunities to Provide Public Testimony.** Supplemental Public Hearings are conducted on Tuesday night and Saturday day to augment record of public testimony. Public testimony is solicited and added to the application record.

No update. The supplemental public hearings are conducted before the hearing officer appointed by the Authority and are intended to afford the time and opportunity for the public to testify on projects of interest to them. Notice of these supplemental public hearings are included in the public notice published in the papers, reported at the Authority website and disseminated through the agency website. Public testimony received will be provided to the Authority.

7. **Second Hearing.** Decision making hearing is held. Staff provides their report, analysis of exhibits submitted and recommended findings of fact for the Authority's adoption that support approval, approval w/conditions or denial of the application. There are no further presentations by the applicant. Prior to decision-making, public testimony is accepted by the Authority.

Updates have the Applicant and/or Intervenor presenting their proposed Findings-of-Fact, Conclusions of Law and Decision and Order to the Authority for their consideration. If appropriate, staff will also prepare and offer their own proposed order to the Authority for their consideration. The Authority, much in the same manner that it does now will choose to adopt those findings, conclusions of law and conditions of approval (or denial) that it deems appropriate.

8. **Decision-making.** Authority takes action by adopting staff findings (or not) and approving, approving w/conditions or denying the application. If the application is approved, the Applicant receives a development permit issued by the Authority.

Update is that in accordance with due process, if the Authority adopts an order that is adverse to the interests of any of the parties, they must be allowed to file exceptions to the Authority's proposed final order. This would require another hearing to be scheduled in the event to allow for the Authority to consider the exceptions filed by any party and to arrive then at a final decision.

If the application is subsequently approved, a final findings-of-fact, conclusions of law and decision and order will be issued by the Authority.

9. Chapter 91-14 HRS currently allows that parties who wish to appeal an administrative order such as the approval of a development permit application may petition the circuit court for any such relief within 30 days of the final action of the Authority.

This provision of law exists today and is likely to continue to exist in law as a remedy for those disagreeing with the action of the Authority.

**It is important to note that under its 2011 rules, any request for variance for any proposed development project must be considered by the Authority prior to any consideration is given to the development permit application.*

Definitions

HCDA Contested Case Hearing/HCDA Hearing. This is a two-part definition. Both conditions must exist.

- 1) The law requires that a hearing is convened on the matter. (206E-5.6 HRS requires that at least 2 hearings are conducted by the Authority when considering a developer's proposal)
- 2) At that hearing, a determination is made regarding the rights, privileges and responsibilities of a party/applicant. (The development permit application hearing determines whether a developer's proposal is approved, approved w/conditions or denied)

HCDA Authority Meeting. Meetings of the Authority is governed by Chapter 92 HRS (Sunshine Law) and its rules on practice and procedure. The Sunshine Law specifies a protocol for the filing of a meeting agenda with the Lieutenant Governor's office, requirement to allow public comment on any agenda item and certain other procedures.

Variance. The state, quality, or fact of being variable, divergent, different, or anomalous. For §15-217 HAR, variance to strict application of rule is not allowed for: change of zone; deletion of any thoroughfare; parks and open space plan; view corridors; land use classifications; any building types and frontage types not allocated to neighborhood zones.

- 1) §15-22-14 HAR Variances (effective 2005, repealed Nov. 11, 2011). The Authority shall hear and determine petitions for *varying the application of this chapter/rule* with respect to a specific parcel of land and building, and may grant a variance based on unnecessary hardship if the applicant would be deprived of the reasonable use of land or building if it were used only for the purpose allowed in the zone;

the request of the applicant is due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning is not drawn into question; and

the use sought to be authorized by the variance will not alter the essential character of the locality nor be contrary to the intent and purpose of the chapter or the Mauka Area Plan.

- 2) §15-217-82 HAR (effective Nov. 11, 2011) Variances. Provides a *mechanism for relief from the strict application of the rules* where that application will deprive the property owner of privileges enjoyed by similar properties because of the subject property's unique and special conditions. Economic or financial hardship is not sufficient justification for granting a variance. Approval of a variance shall require all of the following findings of fact.

Uniqueness. There are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular lot, such that practical difficulties or unusual hardship arise in strictly complying with the rule.

Self-created hardship. That the practical difficulties or unusual hardship claimed has not be created by the owner or by a predecessor in title.

Minimal deviation. That the variance if granted, is the minimum deviation necessary to afford relief.

Neighborhood character. That the variance if granted, will not alter the existing or planned character of the neighborhood or the neighborhood zone in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to public welfare.

No adverse impact. The variance would result in development that is not detrimental to or would adversely impact adjacent properties.

Rule Modification. A slight change or alteration made to improve something or make it more suitable.

- 1) §15-22-88 and §15-22-120 HAR (effective 2005, repealed Nov. 11, 2011) Modifications of specific provisions. As a part of the planned development permit review process, the Authority may modify plan and rule requirements provided a public hearing is held. Modifications may only be granted to: view corridor setbacks; yards; loading space; parking; minimum and maximum ratio of residential and commercial space; tower footprint area; number of towers; platform heights; number of reserved housing units and the cash-in-lieu of providing reserved housing units; and open space.
- 2) §15-217 HAR (effective Nov. 11, 2011) does not allow for any modifications.

Plan or Rule Amendment. The process of altering something; the process of changing, correcting or improving something. The process for changing or amending either the Plan or Rules of the Authority would involve a review and focused or comprehensive amendment of either document.

- 1) §15-22-220 HAR (effective 2005, repealed Nov. 11, 2011) Rules Review and Amendment. The Mauka Area Rules may be reviewed and amended in accordance with the authority's rules of practice and procedure.
- 2) §15-217 HAR (effective Nov. 11, 2011) makes no mention of what is an obvious prerogative of the Authority. However, rulemaking procedures will have to be followed to promulgate any amendments to administrative rule.

Intervention in Contested Case. A person or governmental agency may move to intervene and become a party to a contested case proceeding by filing a timely written motion in accordance with §15-219-32 HAR. The motion shall be in writing and shall state the grounds for the motion. The moving party shall serve a copy of the motion on all other parties to the proceeding and shall file an original plus thirty copies and proof of service with the Authority. Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.

The motion shall state the following.

1. Name, address and telephone number of the applicant and legal counsel, if any.
2. The nature of the applicant's statutory or other right to participate in the contested case proceeding.
3. The nature and extent of the applicant's property, financial, or other interest in the pending proceeding.
4. The other means by which the applicant's interest may be protected.
5. The extent to which applicant's interest will not be represented by existing parties to the contested case proceeding.
6. The extent to which applicant's participation can assist in the development of a sound record.
7. The extent to which applicant's participation will broaden the issues or delay the proceeding.
8. Whether applicant's position is in support or in opposition to the relief sought.